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IN THE

Supreme Court of the United States

October Term 1950

No. 623

HELEN E. LOUGHLIN, ET AL, *Petitioners*,

v.

FIREMEN'S INSURANCE COMPANY OF WASHINGTON AND GEORGETOWN, IN THE DISTRICT OF COLUMBIA, a corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACOB N. HALPER
1511 K Street, Northwest
Washington 5, D. C.
Attorney for Petitioners

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Firemen's Insurance Company of Washington and Georgetown, in the District of Columbia, a corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Helen E. Loughlin, et al, petitioners herein, pray that a writ of certiorari issue to review the judgment entered December 21, 1950, in the United States Court of Appeals for the District of Columbia Circuit, in the cause entitled *Helen E. Loughlin, et al, appellant,* v. *Firemen's Insurance Company of Washington and Georgetown* in the District of Columbia, a corporation, appellee, No. 10673.

STATEMENT OF MATTER INVOLVED

Petitioners brought suit in the District Court of the United States for the District of Columbia to recover for loss resulting from damage by fire to a dwelling house covered by a policy of insurance issued by respondent (R. 2A-4A). Trial was by jury (R. 12A). The issues, upon which the Court acted, were made by the defenses interposed (R. 4A-8A), which charged non-compliance with the terms of the policy: (1) that the insured swore falsely that she was the sole and unconditional owner of the property (R. 96A) whereas she held title for the benefit of the co-plaintiffs (R. 42A); (2) that the insured permitted an increase in hazard by means within her knowledge and control (R. 96A); and, (3) that the insured failed to submit to examination and produce documents upon request of the insurer (R. 98A). On motion of the defendant at the conclusion of all the evidence, the court directed the jury to return a verdict in its favor (R. 12A). Judgment for defendant was entered on the verdict (R. 13A).

The United States Court of Appeals for the District of Columbia Circuit affirmed (R. 136) holding that the uncontradicted evidence left no doubt that the assured had knowingly and intentionally violated without reasonable justification or excuse the requirement of the policy that the assured submit to examination under oath and produce certain records; that the fact of the assured's failure is undisputed. It declined to pass upon the other grounds upon which the court acted.

The principal witness for the plaintiffs was Helen E. Loughlin to whom the policy was issued (R. 84A) and who held the legal title to the insured property (R. 58A) for the benefit of the other plaintiffs (R. 42A). Loughlin also executed and swore to the proof of loss (R. 80A-81A).

As to the first issue there was evidence that the policy provision relating to false swearing contained the word "wilful"; (R. 96A); that Loughlin was not the unconditional owner but held legal title to the property as "straw" for the beneficial owners (R. 21A) and that the insurer was advised of this fact and acquiesced therein (R. 16A, 51A, 54A, 62A, 107A); that Loughlin did not prepare the proof of loss (R. 22A) and did not remember reading it before signing (23A): that Loughlin insisted she was acting for others (R. 32A) and tried to do the best she could (R. 32A); that she signed papers at the request of her principals without wrongful intent (R. 40A) and without any direct benefit (R. 42A).

As to the issue relating to the increased fire hazard, there was evidence that the policy provision precludes liability if the hazard is increased by any means within the control or knowledge of the insured (R. 96A); that an inspection of the premises after the fire disclosed the place littered with newspapers, mattresses and debris, which, in the opinion of the fire officials, constituted a fire hazard (R. 14A, 15A); that following the fire an official of the fire department attempted to contact Loughlin, but was unsuccessful (R. 20A, 21A); that Loughlin had been in the building but did not observe any debris, newspapers, mattresses on the floors (R. 39A); that Loughlin had no knowledge of the condition of the premises before the fire (R. 42A); that the police had received and investigated complaints of drunks and tramps entering the premises (R. 49A-50A); and found evidence of a fire hazard (R. 58A).

On the issue relating to the failure of the witness Loughlin to appear for oral examination, Loughlin testified that she did not see the letter directed to her attorney requiring her to appear for examination (R. 33A-34A); that she did not remember being asked to appear and bring certain documents (R. 35A); that she was not

directly employed by the attorney to whom the letter was directed but worked in another office in the same building (R. 35A). There was also evidence that the letter requesting Loughlin to appear for oral examination required her to appear before Mr. Baker, a notary public, who was then counsel for the insurer and that the documents required related to the ownership by Loughlin of the insured property (R. 119A-120A) and that about a month later the insurer denied liability under the policy, primarily because Loughlin was not the sole and unconditional owner. (R. 104A-105A).

As a further ground the court found, as a conclusion of law, that plaintiffs suffered no damage, they having contracted to sell the property and received, pursuant to the sale, the full purchase price (R. 74A-75A), but see *Washington Mills Emery Mfg. Co.*, v. *Weymouth*, 135 Mass. 503.

The Court prefaced its findings on the issues upon which it directed a verdict by observing that the testimony of the witness Loughlin was "most unsatisfactory" and noted that "if she did not intend intentionally to mislead, she certainly was a discreditable witness". After commenting upon certain portions of her testimony, the Court further held "she was not a creditable witness and her testimony is not entitled to much credence except where corroborated or borne out by written documents (R. 66A)."

In passing upon Loughlin's testimony relating to the beneficial ownership of the insured property and whether it was subject to a mortgage lien, insofar as it affected the sworn statement of the witness as to unconditional ownership, the Court observed that "her testimony was gross and wanton such as to be an intentional act (R. 68A)". And finally, in deciding to take the case from the jury the Court found that "Mrs. Loughlin was a discreditable witness, that there was false swearing by her

in the Proof of Loss, which made the policy voidable," and that "there was strong enough evidence on that point alone to hold the contract void (R. 75A)."

The Court's announced purpose to take the action complained of by petitioners, was in the following language:

> "With respect to the matter now pending before the Court, and especially the motion reviewing the course of the evidence and for a directed verdict, the court makes the following findings of fact and conclusions of law." (R. 63A)[1]

BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the judicial code, 28 U. S. C. A. 347.

The issuance of the writ is urged herein, in the exercise of the court's judicial discretion as prescribed by Rule 38 (5) (c), as presenting a substantial question relating to the application of the Seventh Amendment to the Constitution of the United States.

The judgment of the Court below was entered December 21, 1950 and is final (R. 137).

QUESTIONS PRESENTED

1. In the trial of a common law action by jury in a Federal District Court, at the close of the evidence, the Court, after reviewing the evidence and making findings of fact and conclusions of law, directed a verdict for the defendant, also finding that the principal witness for the plaintiffs was not entitled to credence. In determining

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[1] *Baylis* v. *Travelers Ins. Co.*, 113 U. S. 316.

whether the evidence is sufficient to submit the case to the jury, may the Court determine issues that depend on the credibility of a witness?

2. On appeal from a judgment of a Federal District Court, entered on a verdict directed by the court in a trial of a common law action by jury, the Circuit Court of Appeals affirmed the judgment because it was of the opinion that the verdict could be sustained on one of several grounds that the undisputed and uncontradicted evidence left no doubt as to the propriety of the verdict. Does the judgment of the Court of Appeals have an infirmity in that the judgment affirmed was based generally on the finding of the Trial Court that the principal witness was not entitled to credence?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case presents important questions in the application of the Seventh Amendment to the Constitution in the trial of common law actions before a Federal court and jury.

This case presents an important question relating to the distinction to be observed between the power of the court to determine the law and that of the jury to determine the fact in trial of common law actions before a Federal Court and jury.

This case presents the question of the power of a Circuit Court of Appeals to determine, upon the record, whether the evidence is sufficient to take the case to the jury, in the absence of a showing that the trial court, who alone observed the witnesses, has given due credence to their testimony.

WHEREFORE, petitioners pray the allowance of a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit to the end that this action may be reviewed and the judgment in the lower court reversed.

Respectfully submitted,

JACOB N. HALPER
842 Investment Building
Washington 5, D. C.
Attorney for Petitioners

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FIREMEN'S INSURANCE COMPANY of WASHINGTON and GEORGETOWN in the DISTRICT of COLUMBIA, a *Corporation*.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

Lucian H. Mascuro
N. Mayne Baker
716 Metropolitan Bank Bldg.
Washington 5, D. C.
Attorneys for Respondent

Printed by Law Reporter Ptg. Co., 810 9th St., Wash., D. C.

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Brief of Respondent in Opposition to Petition for Writ of Certiorari

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INTRODUCTION

Petitioners state that the questions present are (1) whether or not, in determining whether the evidence is sufficient to submit the case to the jury, the trial court may determine issues that depend on the credibility of a witness; and, assuming that the trial court did such a thing, (2) whether the judgment of the Court of Appeals affirming the trial court did not have an infirmity in that the judgment affirmed was based generally on the finding of the trial court that the principal witness was not entitled to credence.

The basis on which the trial court directed a verdict does not permit the raising of any such questions.

BASIS ON WHICH TRIAL COURT DIRECTED A VERDICT FOR RESPONDENT

While the trial court did say, as to the testimony of Petitioner, LOUGHLIN, who was the principal witness for Petitioners, that—

> "Her testimony was most unsatisfactory. If she did not intend to mislead, she certainly was a discreditable witness * * * The Court holds she was not a credible witness and her testimony is not entitled to much credence * * *" (R. 66A)

The Court did not take the case away from the jury because of this, but directed a verdict on the following grounds which were not in any wise concerned with the credibility of any witness, but which pertained to completely undisputed testimony—

1. False swearing on the proof of loss that there had been no change in the use, occupancy or exposure of the insured property—the evidence being uncontradicted that the property had been allowed to become a fire hazard (R. 68A, 75A).

2. Undisputed evidence that Petitioners failed to comply with the demand of the Respondent insurance company, made agreeably to the terms of the policy, to submit to examination under oath and produce certain records (R. 69A), notwithstanding another valid provision of the policy which makes compliance with such demand a condition precedent to suit.

3. That a contract of fire insurance is primarily one of indemnity and that Petitioners had shown no loss for which they were entitled to be indemnified by the Respondent (R. 74A).

The United States Court of Appeals for the District of Columbia rendered a very short and concise opinion, which in its entirety reads as follows:

> "This appeal is from a judgment for defendant (appellee) in a suit on a fire insurance policy. At con-

clusion of all evidence the trial court directed a verdict for the insurance carrier upon several grounds, including the undisputed fact that assured (appellant) failed to comply with the demand of the carrier, made agreeably to terms of the policy, to submit to examination under oath and produce certain records. Uncontradicted evidence leaves no doubt that the requirement of the policy was knowingly and intentionally violated without reasonable justification or excuse, notwithstanding another valid provision which made compliance a condition precedent to suit. Cf. Roberto v. Hartford Fire Ins. Co., 177 F. 2d 811 (7th Cir. 1949); American Macaroni Mfg. Co. v. Niagara Fire Ins. Co., 164 F. 2d 878 (5th Cir. 1947); Gipps Brewing Corp. v. Central Mfrs' Mutual Ins. Co., 147 F. 2d 6 (7th Cir. 1945); Merchant's Ins. Co. v. Lilgeomont, 84 F. 2d 685 (5th Cir. 1936). In our opinion the verdict was properly directed upon this ground. We need not deal with other grounds upon which the court acted."

CONCLUSION

On the basis of the foregoing alone and without any extended citation of authority, there is no basis for the review which is sought in this case.

Respectfully submitted,

LUCIEN H. MERCIER
N. MEYER BAKER
716 Metropolitan Bank Bldg.
Washington 5, D. C.
Attorneys for Respondent